

NOTES

When Fences Aren't Enough: The Use of Alternative Dispute Resolution to Resolve Disputes Between Neighbors

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I. INTRODUCTION

*'Good fences make good neighbors.'*¹

Good fences may indeed make good neighbors.² Nonetheless, however wise Robert Frost's thoughts on neighbor relations might be, the question of the practicality of his proposal still remains.³ The 2000 United States Census Bureau statistics illustrate that large parts of the country are very densely populated.⁴ Moreover, less densely populated areas of the United States are obviously not without neighbor disputes. It is impossible in our contemporary society to wall ourselves off from those who live near us. Since building fences cannot practically be utilized to resolve neighbor disputes and to keep neighbor relationships healthy, another solution must be found.

* A.B., Miami University, 2000; J.D. Candidate, The Ohio State University Moritz College of Law, 2003. This Note is dedicated to the memory of my grandfather, Edward G. Ocvirak. His support for and great interest in my education helped instill in me the value of lifelong learning; this value and his memory will live on in my heart. This Note would not have been possible without the love and support of my wife, parents, and college advisor, Jeanne A.K. Hey. All of you have my sincere gratitude.

¹ Robert Frost, *The Wall*, in BARTLETT'S FAMILIAR QUOTATIONS 622 (Justin Kaplan ed., 1992). *But see* "Before I built a wall I'd ask to know, What I was walling in or walling out." *Id.* at 623.

² *Id.* at 622.

³ The 2000 United States Census Bureau reports that in the state of New York, there were 162.6 housing units per square mile. In Massachusetts, the density figure more than doubled to 334.4, and in New Jersey, the figure stood at 446.3 housing units per square mile. These statistics pale, however, in comparison to the District of Columbia, which had an extraordinary 4476.1 units per square mile. U.S. CENSUS BUREAU, GCT-PH1-R, POPULATION, HOUSING UNITS, AREA, AND DENSITY TABLE (STATES RANKED BY POPULATION): 2000, available at <http://www.census.gov/census2000/states/us.html> (last visited Mar. 9, 2003).

⁴ *Id.*

This Note argues that the increased use of alternative dispute resolution in neighborly disputes will bring not only an increased number of resolutions, but also *better* resolutions. Alternative dispute resolution is particularly well-suited to resolving conflicts between⁵ neighbors. Because disputes between neighbors frequently involve minor annoyances, the prospect of formal litigation is simply too daunting for most persons: the costs are too high⁶ and the commitment too great.⁷ For those who do take their grievances to the courthouse, the winner-take-all nature of the traditional legal system is oftentimes ill-suited to propose truly workable solutions in the inherently intimate neighbor relationship.⁸ By and large, alternative dispute resolution is more accessible to the general public, costs less, and provides a faster and frequently more creative resolution than traditional dispute resolution.⁹ The use of ADR in disputes between

⁵ Of course, neighbor disputes can take place both between two neighbors and among several neighbors. To avoid unnecessary wordiness, I shall use the "between" construction throughout this Note.

⁶ See Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 49 (1996) ("[Civil] trials usually are expensive winner-take-all affairs[, which] reinforce[] the consensus that they are dangerous and to be shunned."); Scott E. Mollen, *Alternative Dispute Resolution of Condominium and Cooperative Conflicts*, 73 ST. JOHN'S L. REV. 75, 88 (1999).

⁷ See, e.g., Ronald D. Dworkin, *Taking "Takings Rights" Seriously: A Debate on Property Rights Legislation Before the 104th Congress*, 9 ADMIN. L.J. AM. U. 253, 267 (1995) (arguing that ADR, rather than litigation, is one means of making it easier and less costly for disputants to find resolution). Alternative dispute resolution also addresses the complaints of some that the legal system does not result in disputes being resolved on their true merits. Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 430-31 (1986).

⁸ See, e.g., Scott H. Blackman & Rebecca M. McNeill, *Alternative Dispute Resolution in Commercial Intellectual Property Disputes*, 47 AM. U. L. REV. 1709, 1716 (1998) (arguing that ADR is an effective means of resolving disputes that involve "shared rights" and for which an "either/or result in which one party walks away with all the rights at issue" is ill-suited); Mollen, *supra* note 6, at 88-89 (detailing problems like negative publicity for the neighborhood, high costs, and litigious reputation in resolving neighbor disputes within the traditional dispute resolution mechanisms).

⁹ In recent years, some have questioned the effectiveness of ADR in saving time and money and bringing about more creative solutions. However, the general premise that ADR is successful in meeting the above goal remains. See generally Barbara McAadoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyer's Philosophical Map?*, 18 HAMLINE J. PUB. L. & POL'Y 376 (1997) (citing studies questioning ADR's role in time and cost saving, but presenting empirical data that

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neighbors will lead to more effective, and therefore enduring, resolutions to neighbor problems.¹⁰

Part II of this Note will discuss the particular benefits of using alternative dispute resolution mechanisms, chiefly mediation, to resolve disputes between neighbors. Because of the intimate nature of the neighbor relationship and the character of the typical dispute between neighbors, ADR is well-suited to resolving these disputes: ADR can both fix the problem and fix the relationship. Part III will address different means of encouraging neighbors to use ADR to settle their disputes. Traditional court referral is merely one way to get neighbors to use ADR to resolve their differences. Inclusion of clauses requiring the use of ADR as a means of first resolution in both leases and planned communities' rules and/or standard procedures will also ensure a steady flow of cases to ADR. Finally, Part IV will argue that community justice centers, which have a history of handling these types of disputes, should be expanded. In addition, the existing centers must make the public more aware of the valuable services they already offer.

II. WHY NEIGHBORS SHOULD USE ADR TO RESOLVE THEIR DISPUTES

A. *Hypothetical*¹¹

Suppose that two neighbors have a dispute. One of the neighbors (Larry) is a graduate student at the local university, and the other (Kim) is a construction worker for a contractor building homes. Larry lives above the construction worker in a small apartment building. Kim is a quiet tenant. Because of her job, she must go to bed early each weeknight in order to awake in time for her shift that starts at 6:00 a.m. On the other hand, Larry's first class starts at 1:00 p.m.; he has no classes or teaching assistant obligations on Fridays.

In recent weeks, Larry started waking up Kim at three and four o'clock in the morning with his loud music. The first night, Kim ignored the music. However, when it occurred again three days later, she went upstairs and

suggests practitioners find ADR to be a time and money saver, as well as a means for finding more creative solutions).

¹⁰ See *id.* at 379.

¹¹ The form for this introduction is based upon Professor Ulrich's particularly effective approach in the introduction to her recent article in the *Hamline Journal of Public Law & Policy*: Gretchen Ulrich, *Widening the Circle: Adapting Traditional Indian Dispute Resolution Methods to Implement Alternative Dispute Resolution and Restorative Justice in Modern Communities*, 20 *HAMLINE J. PUB. L. & POL'Y* 419, 419-22 (1999).

asked Larry to turn down the volume of his music. He turned it down that night, and Kim was not awakened by the music for another two weeks. After the third incident, Kim called the landlord to complain about Larry. The landlord assured her that he would call Larry and instruct him to keep his music at an acceptable level.

Unfortunately, Larry continues to keep Kim awake several nights a week. The landlord has done nothing more than promise to call Larry and ask him to keep the volume of his music lower. When Larry and Kim meet in the lobby they usually ignore one another, but last week they started screaming at each other when Larry let the front door to their building slam in Kim's face. At the time, Kim was carrying three bags of groceries and the slammed door caused her to drop one of the bags, spilling its contents all over the ground and breaking the eggs. This latest incident convinced Kim that she needed to take further action, but she did not know what to do. Her landlord was unwilling to do anything, and the prospect of suing Larry for being a nuisance was simply too daunting. She did not have the extra money to pay for a lawyer, nor was she inclined to deal with the ongoing time commitments that a lawsuit would involve. Instead, she decided to look for a new apartment and has come to believe that justice is available only for those who can afford it.

Take two: Suppose another resolution exists for the facts given above. Assume that in Kim's community there is a community justice center providing ADR services for community members having disputes with other community members. Kim's lease might also contain a clause requiring her to engage in arbitration or mediation of disputes with fellow tenants. When Kim and Larry go to mediation, Kim is able to explain, in a controlled way, her need for sleep; Larry is forced to listen and to consider the effects of his behavior. The music problem ceases, and while Kim and Larry do not become close friends, they no longer ignore one another in the hallway.

Obviously, the use of alternative dispute resolution techniques in the second scenario led to a preferable result. In this case, like many others involving neighborly disputes, traditional litigation simply did not provide a viable option. Moreover, due to the landlord's unwillingness to work through the situation, the only remaining resolution available to Kim was for *her*, and not the wrongdoer, to find a new home.

Disputes between neighbors run a wide gamut.¹² However, frequently these problems go unresolved because legal transaction costs—either actual

¹² See, e.g., Zachary R. Dowdy, *Settling Differences without a Court Visit*, NEWSDAY, Nov. 21, 2001, at A25 (dispute over noisy upstairs neighbor); Kevin J.

or perceived—are too high.¹³ When disputes between neighbors are litigated, the costs can be considerable.¹⁴ If parties do litigate their dispute, it is arguable that the type of resolution offered by the courthouse is oftentimes not the resolution that the neighbors really wanted,¹⁵ nor the resolution that would most help their continued relationship.¹⁶

B. ADR Makes Justice More Affordable

The typical dispute between neighbors are oftentimes not “high dollar” disputes.¹⁷ Instead, it likely involves an annoyance or inconvenience.¹⁸ Thus,

Mayhood, *Wrangle Over Kitten is Ending up in Court*, COLUMBUS DISPATCH, Nov. 24, 2001, at 1B (dispute over which neighbor owned a particular kitten); Kara Spak, *Owner Agrees to Move Liquor Store*, DAILY HERALD, Oct. 14, 2001, at 3 (dispute over increased traffic due to a neighboring business's Thursday and Friday night activities).

¹³ See Lieberman & Henry, *supra* note 7, at 428–29. Indeed, one author has suggested that greater use of ADR will lead to deterrence of wrongdoers and those bringing frivolous claims because of the increased ease with which rightful parties will be able to favorably resolve their problems. See Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 229–30 (2000); see also Mollen, *supra* note 6, at 88.

¹⁴ See, e.g., *Mannillo v. Gorski*, 255 A.2d 258 (N.J. 1969). *Mannillo* was a case concerning a suit between neighbors for adverse possession of fifteen inches of property on which a porch step was located. *Id.* The case was litigated to the Supreme Court of New Jersey and subsequently remanded to the trial court. *Id.* In *Mannillo*, a mediated solution would probably have been more acceptable to both parties, and would certainly have cost less than litigating it all the way up to the state supreme court and the subsequent remand.

¹⁵ See, e.g., *id.*

¹⁶ See Ulrich, *supra* note 11, at 435–36 (discussing “restorative justice” as a way, following a crime, to rebuild relationships among victims, offenders, and communities through ADR).

¹⁷ See, e.g., Mollen, *supra* note 6, at 80.

¹⁸ At the same time, neighborhood dynamics can be highly volatile. For an example of the volatility of neighbor relations in an association-type community, and more generally, a discussion of some of the problems inherent in the neighbor relationship, see James L. Winokur, *Critical Assessment: The Financial Role of Community Associations*, 38 SANTA CLARA L. REV. 1135 (1998):

(1) the diversity of backgrounds, interests, stages in the life cycle, and expectations of community residents; (2) the likelihood of conflicts over complaints about rule-violations by residents' own children; (3) the omnipresent conflict between devotion of resources toward future property maintenance and maintenance of lower present assessment levels; (4) possessive feelings towards each resident's home and

bringing a lawsuit is usually not the first impulse that the parties have. It seems far easier to simply "put up with" the noise coming from upstairs than to hire a lawyer and secure witnesses and evidence.¹⁹ Moreover, there is always the chance that the party bringing suit will lose.²⁰ Due to negative perceptions about the legal system, many doubt the system's effectiveness at getting to the truth of disputes.²¹ Upon full consideration, it will frequently seem like a better economic decision not to resolve the matter under traditional legal methods.²²

Therefore, when costs²³ are too high, parties will not litigate their problems, and if the parties are unaware of other options for dispute resolution, the problems will remain. The effects of this withdrawal from any sort of problem-solving process are several-fold. First, and arguably of greatest importance, the aggrieved party finds no resolution to her problem and is forced to continue living with the situation.²⁴ Second, because she is unable to avail herself of the legal system, she may question the effectiveness of the system as a whole at resolving problems.²⁵ Finally, since the other

freedoms to behave within that home and its environs as the resident chooses, which frequently confront detailed regulation of behavior within and around the home; (5) widespread ignorance and confusion among homeowners regarding the obligations to which they are subject, often not freely chosen by these residents when buying into the community; (6) the threat of changing rules and assessment levels applicable to association members; and (7) the juxtaposition of the friendship and neighborliness expected among association members with the conflicts, dissent, assessment and rule enforcement that are traditionally viewed in our society as distinctly unfriendly and non-neighborly.

Id. at 1143.

¹⁹ See Mollen, *supra* note 6, at 86-91.

²⁰ See Hylton, *supra* note 13, at 229-30.

²¹ See *id.*

²² See *id.*

²³ Although I generally mean "costs" to include those used to bring suit directly against the neighbor, there are certainly other legal costs that can arise from disputes between neighbors. For example, in the case involving the tenant living above a coffeehouse, the upstairs tenant was considering legal action against her landlord in order to release herself from the lease. See *infra* note 123.

²⁴ See NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* § 12.2, at 228 (1989) (stating that policymakers prefer ADR where it has promise to provide "better solutions" than traditional dispute resolution).

²⁵ At the extreme, the aggrieved neighbor may come to believe that the courts, and thus justice, are luxuries only for the wealthy.

neighbor is not stopped from engaging in his “bad conduct,” he will likely continue the behavior.²⁶

Alternative dispute resolution methods can mitigate the problem of the high cost of litigation. Indeed, its ability to reduce dispute resolution costs is generally regarded as one of the chief benefits of ADR.²⁷ Because ADR costs less than traditional dispute resolution, it is more accessible for the parties involved.²⁸ Thus, the aggrieved neighbor is better able to find a solution to her dispute, and her “problem neighbor” will likely be deterred from engaging in similar behavior in the future.

C. ADR Can Lead to More Creative and Lasting Solutions

1. Enabling Nontraditional Resolutions

The use of ADR does more than just reduce costs.²⁹ Alternative dispute resolution can provide solutions that are more creative and better tailored to disputants’ needs and expectations than traditional dispute resolution.³⁰ One

²⁶ He, too, may come to doubt the effectiveness of the legal system’s ability to have an impact on conduct, and because he is not stopped from engaging in his annoying behavior, he will be undeterred in future situations. *Cf. Hylton, supra* note 13, at 229–30 (discussing the ways that arbitration can deter wrongdoers).

²⁷ *See* McAdoo & Welsh, *supra* note 9, at 387 (finding that practitioners regarded the reduction of costs for both themselves and their clients as the most important reasons for using ADR); *see also* Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133 (1997) (discussing Congress’s approval in the Civil Justice Reform Act of 1991 of using ADR as a means for reducing the cost of litigation in civil cases).

²⁸ Ulrich, *supra* note 11, at 434. However, ADR may still remain too expensive for some disputants. For this reason, if a community is truly interested in resolving neighborly disputes, it must ensure that low cost ADR services are available to those who need them.

²⁹ *See, e.g.,* Carrie Johnson, *Mediators Help Settle Feuds, Unclog Courts*, ST. PETERSBURG TIMES, Nov. 17, 2001, at 1; *see also* Jill Richey Rayburn, Note, *Neighborhood Justice Centers: Community Use of ADR—Does It Really Work?*, 26 U. MEM. L. REV. 1197, 1199 (1996) (stating that ADR is particularly attractive to some disputants because of their “increased access to justice” through reduced costs, more “convenient hours and locations,” and “improved process[es] . . . allowing [disputants] to delve into the underlying reasons for the dispute without the constraints of the formal legal system”) (quoting in part STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION 347–48 (1985)).

³⁰ *See* Mollen, *supra* note 6, at 95 (“[P]arties, with the help of the mediator . . . [can] explore *all* possible options for resolving the dispute.”) (emphasis added); Rayburn,

example of this point can be found in *Mannillo v. Gorski*.³¹ In *Mannillo*, Mrs. Gorski defended against a suit brought by her neighbors for an alleged "trespass," which resulted from her porch steps extending fifteen inches onto the Mannillos' property.³² Under the traditional litigation system, Mrs. Gorski needed to proceed under a theory of adverse possession to find a solution to the problem of her encroaching steps.³³ Had the parties used ADR, they could have found another resolution: perhaps Mrs. Gorski could have paid her neighbor for the value of the property on which her steps were located, or perhaps a mediation could have brought a fuller appreciation for each party's concerns and led to a no-cost resolution.³⁴

Another example is the case of the rightful kitten owner.³⁵ In the kitten owner case, it is unlikely that the parties ever thought that they would end up in court fighting over who would be the kitten's true owner. A mediation of this dispute would have likely led to a far more satisfying result than a court deciding that one person was the rightful owner of the kitten and the other was not.

At first glance, it might seem that the chief benefit of using ADR in the above examples is its ability to save the parties money.³⁶ However, the benefits of ADR extend beyond the economic realm. When the parties themselves can decide upon the best solution, they are not bound by the legal strictures and customs that tend to bind courts and lawyers.³⁷

supra note 29, at 1199; *see generally* Lon L. Fuller, *The Forms and Limits and Adjudication*, 92 HARV. L. REV. 353 (1978) (discussing the limitations of traditional adjudicatory methods in resolving certain types of disputes).

³¹ *Mannillo v. Gorski*, 255 A.2d 258 (N.J. 1969).

³² *Id.* at 259-60.

³³ *Id.* at 260. Even the language of the traditional legal arena is foreign to the lay person: Would a lay person describe a fifteen inch encroachment as a "trespass"? Would a lay person be familiar with a legal term of art like "adverse possession"? Thus, even the language necessarily used in traditional dispute resolution can further divide (and confuse) neighbors in search of resolution to relatively simple problems. *Cf.* Jacqueline M. Nolan-Haley, *Lawyers, Clients, and Mediation*, 73 NOTRE DAME L. REV. 1369, 1371 (1998) (stating that "mediation . . . offer[s] a new vision . . . largely because it pays more attention to the dignity of human persons than to the abstractness of legal rules"). Mediation can allow the parties themselves to tell their stories. *Id.* at 1375.

³⁴ GOLDBERG ET AL., *supra* note 29, at 514 (encouraging the use of ADR to resolve cases involving "interpersonal problems").

³⁵ Mayhood, *supra* note 12, at 1B.

³⁶ There is little doubt that ADR would have cost less than litigating *Mannillo v. Gorski* up and down the court system.

³⁷ *See* Nolan-Haley, *supra* note 33, at 1375.

2. *The Importance of Letting the Client Talk*

A mediation grants the parties a forum in which to discuss their concerns in a measured and controlled way, and it forces the parties to speak for themselves.³⁸ At trial, the parties' attorneys speak.³⁹ The attorneys are concerned with ensuring that their side wins, not necessarily that each side gets a fair hearing.⁴⁰ However, the use of ADR empowers the parties themselves to come up with solutions.⁴¹ Since they are the most knowledgeable of their particular situation, and because we are dealing with relatively low-cost disputes, it makes sense to empower the parties in this way.⁴² With the guidance of a mediator, or the decision of an arbitrator openly and honestly informed by the persons who know the most about the situation, truly creative, lasting, and satisfying resolutions are possible.⁴³

D. *Involving the Parties in Dispute Resolution Heals Broken Relationships*

Direct involvement of affected persons in the decision making process is important because, in this way, all those involved can gain a "greater understanding of the incident . . . and recovery . . . from the incident."⁴⁴ When all of the affected persons become involved in finding a solution, "the participants [have] equal responsibility for leadership, and ownership of the

³⁸ See ROGERS & MCEWEN, *supra* note 24, § 3.3.

³⁹ See *id.*

⁴⁰ See Nolan-Haley, *supra* note 33, at 1373 (criticizing the lack of "client decisionmaking" in traditional adversarial practice); see also Ulrich, *supra* note 11, at 434 (discussing the general benefits of ADR); Rayburn, *supra* note 29, at 1199.

⁴¹ Rayburn, *supra* note 29, at 1227; see also Community Justice Center of Burlington, Vermont, About the CJC, at <http://www.communityjusticeburlvt.org> (last visited Mar. 9, 2003).

⁴² See, e.g., David M. Pritzker, *Working Together for Better Regulations*, NAT. RESOURCES & ENV'T., Fall 1990, at 29 (stating that in the arena of regulation drafting, better and more accepted regulations are created if all parties with a stake in the matter participate in the negotiating process).

⁴³ Raymond Shonholtz, *Neighborhood Justice Systems: Work, Structure, and Guiding Principles*, MEDIATION Q., Sept. 1984, at 3, 16 (contrasting the law's focus on minimums of behavior with ADR's ability to lead participants to "a higher level of social behavior"); see also Rayburn, *supra* note 29, at 1198.

⁴⁴ *Id.* at 433.

solution”⁴⁵ This notion of “ownership of the solution” by the parties⁴⁶ seems to be lacking from traditional dispute resolution. In traditional dispute resolution, it is the judge or jury that has ultimate ownership of the solution. Similarly, it is each party’s lawyer who has the ownership of presenting the arguments.⁴⁷ Such an abdication of responsibility for finding a solution seems particularly ill-suited for disputants involved in the type of intimate relationship in which neighbors are involved.⁴⁸

⁴⁵ *Id.* at 434. Although Professor Ulrich is speaking of traditional Native American means of resolving disputes outside of a formalized court system in the quoted passages, the same could be said for a traditional, non-Native American alternative dispute resolution process. Indeed, Professor Ulrich states later in her article that non-Native American “restorative justice” processes (a method of resolution conducted after a crime has been committed by bringing together all affected members of the community—for example, the convicted criminal, victim, and victim’s family) are based on values similar to traditional Native American dispute resolution. *Id.* at 437. I believe that a mediation or arbitration arranged to involve all of the necessary participants of a dispute between neighbors would be consistent with the goals of traditional native dispute resolution methods.

⁴⁶ Mollen, *supra* note 6, at 96 (“[In mediation,] the parties ‘own’ the process.”); Nolan-Haley, *supra* note 33, at 1371 (“[In mediation,] the parties affected by a dispute decide the outcome of the dispute.”); Rayburn, *supra* note 29, at 1227; *see also* Nolan-Haley, *supra* note 33, at 1374 (stating that the “controlling principle” of mediation is the principle of self-determination).

⁴⁷ *See* ROGERS & MCEWEN, *supra* note 24, § 3.3, at 22:

[Because the parties] know their own interests and needs better than do their attorneys, their direct participation in the give and take of settlement may produce satisfactory outcomes more quickly, particularly where a wide variety of outcomes is possible. When attorneys act as surrogates in the negotiation, communication is inefficient and potentially inaccurate

⁴⁸ However, some question the ADR system’s ability to administer justice that truly mirrors the community’s values. *See, e.g.*, Barbara Yngvesson, *Inventing Law in Local Settings: Rethinking Popular Legal Culture*, 98 YALE L.J. 1689 (1989). Professor Yngvesson argues that the ADR movement’s focus on the training of mediators and arbitrators and the defining of alternative justice has led to a domination of ADR by elites. *Id.* at 1703. Thus, “[t]he alternatives movement is extending a professional therapeutic culture in the guise of a popular culture developed from existing community values.” *Id.* Because the elites are frequently not community members, they bring their own values to ADR processes with the result that ADR is not really the reflection of community values that it claims to be:

[T]he uneasy relation of ‘community’ justice to existing neighborhoods and other social groupings, the tendency of some programs to identify ‘community’ with trained professional mediators rather than with local cultural norms, and the self-

Alternative dispute resolution can do more than just lead to the creation of customized resolutions that better address the parties' real concerns. Because of its unique nature of direct disputant involvement, the very processes of mediation and arbitration can lead to the healing of a broken relationship.⁴⁹ At the mediation or arbitration, the parties have an opportunity to speak to one another in person in a controlled environment.⁵⁰ ADR has been used successfully in divorce, child custody, and in other disputes between persons involved in an ongoing relationship.⁵¹ In contrast, a trial, with its winner-take-all solution, may leave the parties even more embittered towards one another than when they started.⁵²

The traditional adversarial process is simply too focused on the individual parties and too competitive to deal successfully with disputes involving persons in closer relationships.⁵³ Disputing neighbors will likely see each other quite a bit, especially in apartment and condominium communities.⁵⁴ Therefore, maintaining good relations is an important goal. If disputes are "resolved" by hard-nosed attorneys, whose focus is on winning at any cost, it is the neighborly relationship that will suffer.⁵⁵ However, an ADR process that ensures the protection of *community* values and is focused on the parties' true desires will lead to better resolutions of their disputes.⁵⁶

conscious use of strategies that deflect collective concerns into 'private' problems represent a powerful move to shape the perspective and values of local residents.

Id. at 1708.

⁴⁹ See Nolan-Haley, *supra* note 33, at 1374 (stating that mediation can be a "healing or transformative process").

⁵⁰ See ROGERS & MCEWEN, *supra* note 24, § 3.3, at 21 (suggesting that the acknowledgment of parties' emotions and other "legally extraneous matters" in mediation can facilitate resolution of disputes).

⁵¹ See Rayburn, *supra* note 29, at 1225.

⁵² See, e.g., Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1010-11 (1999) ("The failure to apologize can also be a central factor in escalating conflict At times a vicious cycle may arise. An offender who wants to apologize, but fears being sued, may refrain from apologizing—and the absence of an apology is precisely what triggers the suit.").

⁵³ See Nolan-Haley, *supra* note 33, at 1369.

⁵⁴ See Mollen, *supra* note 6, at 80.

⁵⁵ See *id.* at 88.

⁵⁶ See Nolan-Haley, *supra* note 33, at 1372 (discouraging the use of the "cut-throat" tactics that characterize the modern adversarial process and encouraging the use of "[c]ooperation, courtesy, decency, dignity, mutual respect, and reasoned discourse").

E. *The Promise of Alternative Dispute Resolution*

The use of ADR to resolve neighborly disputes has great promise. By lowering costs, dispute resolution is available for more persons and for the resolution of more problems.⁵⁷ Because ADR enables nontraditional solutions to problems, using it means that solutions better tailored to achieving the parties' true goals are possible.⁵⁸ Finally, and perhaps of the greatest importance, the very process of ADR can help neighbors mend their relationships. Like Larry and Kim, most of us see our neighbors—at least in passing—on a regular basis,⁵⁹ and also like Larry and Kim, we want these encounters to be as pleasant as possible. Because of the intimate relationships we have with our neighbors, merely “getting what we want” from dispute resolution is only part of solving the dispute.⁶⁰ Unless the relationship is also mended, other future problems are possible, and even likely.⁶¹ As one commentator put it, “[t]he resolution of the dispute is only one possible benefit Other benefits include: the disputants' better understanding of the other side's viewpoint, knowing the other disputant as a ‘person’ for the first time, gaining exposure to conciliation techniques, and venting frustrations in a safe environment.”⁶² Only if ADR cannot achieve this basic harmony should the aggrieved party take more drastic steps like moving or instigating formal litigation.

⁵⁷ However, even neighbors financially able and willing to use traditional dispute resolution can benefit from using ADR to resolve their disputes.

⁵⁸ Lieberman & Henry, *supra* note 7, at 429–31.

⁵⁹ On average, there are 79.6 persons and 32.8 housing units for every square mile in the United States. U.S. CENSUS BUREAU, GCT-PH1-R, *supra* note 3, available at <http://www.census.gov/census2000/states/us.html>.

⁶⁰ See Mollen, *supra* note 6, at 88.

⁶¹ See *generally id.* (discussing the benefits of mediation on the parties' relationship).

⁶² See Rayburn, *supra* note 29, at 1225. Moreover, if ADR is used, at least one particularly negative aspect of traditional dispute resolution—litigation for the sake of litigation—can be avoided. See, e.g., Mollen, *supra* note 6, at 88 (“As the judicial process proceeds further, many parties believe that their integrity, their honor, and their self-respect require nothing less than full engagement on the battlefield.”).

III. HOW WILL NEIGHBORS BE ENCOURAGED TO USE ADR TO SETTLE THEIR DISPUTES?

As discussed in Part II, there is a variety of reasons why ADR is well-suited for dealing with neighbor disputes. However, even if disputants can be convinced of the value of ADR methods in resolving their disputes, there remains a question of logistics. How will neighbors be encouraged to use ADR to settle their disputes? The following methods can make ADR more accessible to persons having disputes with their neighbors: (1) traditional court referral by a judge to either a court-based ADR program or a community ADR program; (2) the establishment of programs in communities that deal specifically with disputes between neighbors, or at least the creation of divisions within existing programs for dealing with these types of disputes; and (3) the inclusion in leases and planned communities' charters of clauses requiring the use of ADR methods as a first means of resolution. These three proposals will help ensure that many more disputes between neighbors will end up resolved.⁶³ With increased resolution rates, bad neighborly behavior will be deterred, and neighbors will be generally more satisfied with their living conditions.

A. Traditional Court-Referral

Alternative dispute resolution programs sanctioned by different courts have been popular for many years.⁶⁴ Indeed, an arbitration program was formed in the federal circuit courts as early as 1974.⁶⁵ Today, some cases

⁶³ However, the appropriate use of ADR is necessary for "true resolution." Sometimes attorneys take the same practices and techniques they use in the courtroom, that are destructive to persons in intimate relationships, and use them in ADR. See Nolan-Haley, *supra* note 33, at 1376-82. Indeed, some (perhaps many) lawyers do not yet grasp the differences between ADR processes and traditional dispute resolution processes. See *id.* at 1381. If the neighbors have attorneys involved along side them in the alternative dispute resolution, it is imperative that those attorneys take time to understand the clients' true desires and the deliberative process. See *id.* at 1375, 1381. Anything less may turn the ADR session into a crude version of traditional dispute resolution. See *id.* at 1372-73.

⁶⁴ See Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 9-38 (1990); see also McAdoo & Welsh, *supra* note 9, at 376-77.

⁶⁵ Kaufman, *supra* note 64, at 10-12 (discussing Judge Kaufman's creation of an ADR program within the Second Circuit Court of Appeals to deal with the burgeoning caseload).

docketed for trial are routinely first referred to the court sanctioned ADR program.⁶⁶ In the case of ADR and its use for disputes between neighbors, judges should continue to refer potential litigants to court-annexed ADR programs.⁶⁷ In addition, courts should expand these programs in ways that will ensure that disputing neighbors are served, as a lawsuit can be extremely destructive to the neighbors' relationship.⁶⁸ Referring such cases first to mediation and arbitration services may stave off the potential harm that can come with traditional litigation.⁶⁹

1. *Different Ways to Encourage Court Referral of Cases to ADR*

All officers of the court have a duty to consider employing alternative dispute resolution methods in disputes between neighbors.⁷⁰ It is not simply judges and court staff who should be on the lookout for cases to refer to ADR; the parties' lawyers also play an important and unique role.⁷¹ One's lawyer is the first officer of the court a party will encounter. As such, lawyers are best suited to advise clients to consider using an alternative dispute resolution method, either court-annexed or independent.⁷² As Professor Cohen argues, a simple apology is oftentimes all the other party wants.⁷³ Similarly, lawyers should be sensitive to their clients' true desires because a

⁶⁶ MARGARET SHAW & J. MICHAEL KEATING, JR., ALTERNATIVE DISPUTE RESOLUTION PROGRAMS IN OHIO, MICHIGAN AND ILLINOIS 62 (1992) (finding that large portions of cases at several Illinois community justice centers were court referrals); McAdoo & Welsh, *supra* note 9, at 376 (stating that "in nearly every state, at least one local state and/or federal court has incorporated ADR in some manner").

⁶⁷ Indeed, in one area of the United Kingdom, disputes between neighbors became so voluminous that it was necessary to refer the disputes to ADR programs because traditional dispute mechanisms were unable to keep up with the volume. *Keeping the Peace among Neighbours*, UK NEWSQUEST REGIONAL PRESS—THIS IS WILTSHIRE, Nov. 17, 2001.

⁶⁸ See *supra* Part II.D.

⁶⁹ When disputes between neighbors do go to trial, judges and lawyers should be particularly sensitive to the unique nature of the problem.

⁷⁰ See generally Cohen, *supra* note 52 (arguing that lawyers have a duty to discuss the option of apology over litigation).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 1010–18.

trial may not be what the client wants.⁷⁴ However, if the client is unaware of what arbitration and mediation are, or if the client does not know that such services are available, she may feel that traditional trial is the only option.⁷⁵

Lawyers should also remind their clients of the potential harm that may come from winning, or successfully defending against, a suit.⁷⁶ Just because a client wins in the courthouse does not mean that she will win with her neighbor.⁷⁷ A victory in court, while solving the immediate problem, can further exacerbate problems in the relationship.⁷⁸ If the relationship is not healed, continued problems are probable.⁷⁹ ADR has this power to heal.⁸⁰

2. The Difficulties of Court Referral of Cases Involving Disputes Between Neighbors

There are several practical drawbacks to traditional court-referral. Before a court can refer a case to ADR, the case obviously must first come before the court. However, neighbor disputes frequently do not get filed because the costs to litigate are too high relative to the cost of the problem.⁸¹ Court-referral, will thus be unable to channel to ADR the large number of cases that never come before the court.

Another consideration related to traditional court referral is cost. One of ADR's benefits is its ability to serve as a low-cost alternative to conventional dispute resolution.⁸² If the lawyers representing the feuding neighbors

⁷⁴ See ROGERS & MCEWEN, *supra* note 24, § 3.2, at 17 (stating that considerations such as the disputants' long-term relationship ought to be considered when assessing whether or not to use alternative dispute resolution); Nolan-Haley, *supra* note 33, at 1375–76.

⁷⁵ Cf. Nolan-Haley, *supra* note 33, at 1372 (lamenting the fact that modern advocacy has translated into "zealous advocacy for clients with little moral responsibility for helping clients achieve their goals").

⁷⁶ See Mollen, *supra* note 6, at 88–90.

⁷⁷ See *id.* at 88.

⁷⁸ See *id.*

⁷⁹ See *id.* If there is hostility between neighbors, any encounter has potential for conflict; moreover, this potential is very real because neighbors often deal with one another on a regular basis. See *id.* Furthermore, conflicts between one set of neighbors may envelop other neighbors as the parties attempt to bring more supporters to their "side" of the conflict. See *id.* at 88–89.

⁸⁰ See discussion *supra* Parts I.C and I.D.

⁸¹ Mollen, *supra* note 6, at 86–91; see also Ulrich, *supra* note 11, at 434.

⁸² See McAdoo & Welsh, *supra* note 9, at 380; Resnik, *supra* note 27, at 133.

become involved in the dispute resolution process and employ techniques from traditional litigation, the costs might remain too high.⁸³

An additional concern about the involvement of lawyers in court referred ADR is the inability of the parties' lawyers to understand the differences between conventional dispute resolution and ADR.⁸⁴ "Many lawyers simply lack a basic understanding of the mediation process, the premises and values which drive it, and the creative outcomes which are possible."⁸⁵ Lawyers who bring techniques from traditional dispute resolution to ADR can make an ADR session look more like the very process clients seek to avoid.⁸⁶ In this way, the more abstract benefits of ADR can be lost.⁸⁷

3. *The Overall Effectiveness of Traditional Court-Referral*

Although court-referral is currently a popular means of channeling cases to ADR,⁸⁸ its effectiveness in bringing disputes between neighbors to ADR is questionable. Too many of these cases simply will never make it to a court in the first place.⁸⁹ When cases are referred, because lawyers are likely to be already involved, there remains the very real possibility that the parties' advocates will not act in their clients' best interests by using conventional dispute resolution tactics at the ADR session.⁹⁰ Therefore, because of the possibilities that court-referral may miss many of the cases in need of a resolution by ADR, and that retained counsel⁹¹ will defeat many of the

⁸³ See John Gibeaut, *Detoured to ADR*, A.B.A. J., Oct. 2001, at 50, 52 (suggesting that an ADR system can be designed in such a way that the cost savings aspect of ADR can be mitigated).

⁸⁴ See generally Nolan-Haley, *supra* note 33 (profiling the problems arising from the involvement of lawyers who do not understand the differences between traditional dispute resolution and ADR).

⁸⁵ *Id.* at 1373.

⁸⁶ See *id.*

⁸⁷ See *id.* (citing ADR's emphasis on "mutual respect" over conventional dispute resolution's "rugged individualism").

⁸⁸ See generally Kaufman, *supra* note 64 (discussing the use of ADR in the federal courts).

⁸⁹ See Ulrich, *supra* note 11, at 433-34.

⁹⁰ Nolan-Haley, *supra* note 33, at 1372-73.

⁹¹ It is arguable that lawyers geared up for the traditional dispute resolution arena will find it particularly difficult to make the transition to ADR.

unique benefits of ADR,⁹² other means of getting neighbor disputes to an effective ADR session should and must be explored.

B. Community Justice Centers

Another means of ensuring the accessibility of alternative dispute resolution mechanisms to feuding neighbors is by encouraging the creation of more independent community ADR centers.⁹³ In addition, existing centers should be encouraged to expand their programming as it relates to disputes between neighbors, and promote their services to make these services better known to the communities they serve.⁹⁴

1. Ways to Encourage the Use of Community Justice Centers

Since calling the police is frequently one of the first things neighbors do when they have a dispute with a neighbor,⁹⁵ community centers should ensure that police departments are aware of their existence, and encourage police officers to refer disputants to the centers.⁹⁶ In this way, police

⁹² A complete discussion of the problems for parties and their relationships with other parties stemming from the actions and attitudes of their lawyers is beyond the scope of this Note. However, it is the topic of much discourse. See, e.g., MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993); Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995).

⁹³ Commonly called "community justice centers," these centers number in the hundreds around the country. E.g., Mary T. Schmich, *In Sue-Happy Society, Mediators Lighten Court Load*, CHI. TRIB., Dec. 16, 1991, at C2 (stating that 250–300 centers were in existence at the end of 1991).

⁹⁴ Professor Yngvesson points out that "[m]ost clients of neighborhood justice centers are referred there by the court, and those operated in complete separation from the court system have few customers." Yngvesson, *supra* note 48, at 1703. Certainly better marketing could garner more customers. Indeed, some centers report great success in helping members of the public resolve their disputes. See, e.g., Johnson, *supra* note 29, at 1. A study of methods employed at these centers could aid other centers in working to make their services more accessible to the general public. *Id.*

⁹⁵ Richard S. Clayton, *Rage or Resolution? When Talking Isn't Enough, Mediators Can Help Solve Disputes*, COLUMBIAN (Vancouver, Wash.), Aug. 5, 1999, at Neighbors-1.

⁹⁶ The county sheriff's office in Vancouver, Washington admitted that frequently the police are unable to solve the disputes. *Id.* Thus, channeling the disputants toward a

departments can act in a role similar to that of courts by referring cases to ADR when they are called to intervene in disputes. Unlike traditional court-referral, however, police departments *do* frequently come into contact with the disputing neighbors.⁹⁷ Consequently, suggestions from police officers directly to feuding neighbors encouraging them to try ADR in order to settle their disputes avoids the problem facing community justice centers in court-referral: namely that the system relies upon referral of neighbor disputes by courts that miss large numbers of disputes.⁹⁸

In addition to working closely with police precincts to encourage their use, community justice centers should also engage in campaigns to make the public aware of their presence. For example, the community justice centers could design an informative pamphlet for tenants and homeowners outlining all offered mediation and arbitration services, and leave the pamphlets at tenant resource centers, apartment complex rental offices, and with homeowners' associations.

The local community center will probably be the most important means of providing ADR services to disputing neighbors.⁹⁹ Community justice centers tend to be accessible to the general public and less daunting than a lawsuit.¹⁰⁰ Moreover, the justice center empowers disputants in the quest for resolution.¹⁰¹ This empowerment is an important advantage of ADR over traditional dispute resolution in this area.¹⁰² The involvement of citizens from the community as mediators and arbitrators, and a continued high

community justice center could help avoid further escalation of the situation when the police are unavailable.

⁹⁷ See *id.*

⁹⁸ See discussion at *supra* Part III.A.3. Moreover, since police officers are sometimes unable to resolve disputes between neighbors, the officers' ability to suggest a means of resolution would also improve their ability to serve their communities, and hopefully aid in the prevention of future problems. See Clayton, *supra* note 95, at Neighbors-1. Indeed, the Community Boards of San Francisco accept referrals from "courts, probation officers, [and] other government organizations" Rayburn, *supra* note 29, at 1206.

⁹⁹ See Rayburn, *supra* note 29, at 1198.

¹⁰⁰ See, e.g., Community Justice Center of Burlington, Vermont, *supra* note 41, at <http://www.communityjusticeburlvt.org> (The "About the CJC" links states, "The Community Justice Center *encourages citizens to set a standard* for harmony and safety in their neighborhoods, and supports them in developing the skills and tools needed to achieve that standard." (emphasis added)).

¹⁰¹ See, e.g., *id.*

¹⁰² See *supra* Part II.C and II.D.

degree of involvement of disputants in the resolution process are fundamental to the integrity of the ADR process.¹⁰³

2. *The Importance of Keeping Down the Costs of ADR*

Since lower costs are one of the major attractions of ADR,¹⁰⁴ the lesser-expensive services typically available at community justice centers¹⁰⁵ will likely be those most favored by disputants generally. Because traditional dispute resolution is often a prohibitively expensive means of resolving the typical clashes between neighbors, the same could become true in the use of ADR by disputing neighbors.¹⁰⁶ As such, communities that are interested in promoting ADR as a viable option for resolving disputes between neighbors should consider subsidizing the cost of the ADR services in some way.¹⁰⁷

¹⁰³ In this way, disputants will trust the arbiters of their disputes, and, through the direct involvement of the disputants, the process will help ensure that the solutions will be lasting and helpful to the parties' long-term relationship and goals. *See* Mollen, *supra* note 6, at 94–96; Nolan-Haley, *supra* note 33, at 1371; Ulrich, *supra* note 11, at 434.

¹⁰⁴ *See supra* Part II.B.

¹⁰⁵ *See generally* McAdoo & Welsh, *supra* note 9 (finding that using ADR can reduce the cost dispute resolution); *see also* Rayburn, *supra* note 29, at 1199.

¹⁰⁶ Some scholars question whether community justice centers will ultimately save disputants money. They theorize that as time goes on and the centers pull in more cases that would have never gone to trial because the transaction costs were too high, and as lawyers representing the different parties become more involved, the decisions of the mediators and arbitrators will more closely resemble the decisions of judges, and will thereby reduce many of the advantages of ADR. *See, e.g.,* ROGERS & MCEWEN, *supra* note 24, § 4.4, at 41.

¹⁰⁷ *See, e.g.,* Rayburn, *supra* note 29, at 1226–27 (profiling three community justice programs in Tennessee, where one is funded completely by the county government, another is run by volunteers, and a third requires the parties to pay for the ADR services); *see also* ELIZABETH L. ALLEN, J.D. & DONALD D. MOHR, M.A., *AFFORDABLE JUSTICE* 104 (2d. ed. 1998) (discussing ways the average person can find affordable justice. ALLEN & MOHR encourage disputing neighbors to use community justice centers, which, because they are oftentimes subsidized or staffed by volunteers, usually offer an affordable means of dispute resolution); Community Justice Center of Burlington, Vermont, *supra* note 41, at <http://www.communityjusticeburlyvt.org> (detailing the funding of a community justice center in Burlington, Vermont). The center is a project of the city of Burlington, and its funding comes from the following sources: the State's Department of Human Services, the State's Department of Social and Rehabilitative Services, the United States Department of Justice (Bureau of Justice Assistance), the City of Burlington, community volunteers, and charitable contributions to the center. *Id.*

Doing so creates the possibility of lowering costs in other areas of community spending.¹⁰⁸

3. The Importance of Maintaining and Promoting a Place for ADR in the Community

Certain changes will help ensure that feuding neighbors utilize ADR more frequently in settling their disputes. These changes include: increased advertisement of the services available to disputing neighbors at neighborhood justice centers, funding that keeps the costs of ADR services low, expansion of the community justice center to accommodate disputing neighbors, and referral to community centers by police departments. However, in addition to these more practical considerations, community justice centers must also ensure more generally that they create a location in their communities for providing the services they offer.¹⁰⁹

Two researchers found that the future of community justice depended upon several factors: value to the community, capacity to deal with the community's problems, and the authority of the system.¹¹⁰ The viability of community justice, therefore, seems to depend on more than merely offering low cost services to the public.¹¹¹ For example, it is necessary for the community's criminal justice system not to be reluctant to cede authority to the community justice center, and for the community to believe that such a center is necessary.¹¹² Therefore, if community justice centers do not respond to a perceived need in their communities, or if existing centers do not convince their communities that they offer valuable services, the centers may

¹⁰⁸ For example, as seen in *supra* Part II.A.1, police are frequently called upon by feuding neighbors, but are usually unable to offer effective assistance. Over time, community justice centers could reduce this ineffective use of police resources.

¹⁰⁹ See WALTER J. DICKEY & PEGGY MCGARRY, COMMUNITY JUSTICE IN RURAL AMERICA: FOUR EXAMPLES AND FOUR FUTURES 17-18 (2001).

¹¹⁰ *Id.* at 15.

¹¹¹ See *id.*

¹¹² See *id.* "Because the community justice movement lacks legal authority, it relies on community demand for its power and legitimacy. If such support is lacking, the movement will be unable to survive resistance from the criminal justice system or indifference from community leaders and members." *Id.* The U.S. Department of Justice study suggests that community justice faces four different fates: it can fade away, become an adjunct to the criminal justice system, focus on prevention, or become a full-fledged "community problem-solving effort." *Id.* at 15-16.

disappear.¹¹³ On a related front, those wishing to undertake the creation of a new community justice center would do well to demonstrate how the center fits into the overall picture of dispute resolution in the community.¹¹⁴

4. *Community Justice Centers: Proposals for the Future*

By 1993, the ABA reported that there were more than 400 community justice centers.¹¹⁵ Thus, much work has already been done in the area of creating justice centers. In those communities currently possessing justice centers, it will be important to make it known to the community members what the centers do and that they are available to help disputants.¹¹⁶ Additionally, existing justice centers must ensure that they promote viable alternatives to both doing nothing about a dispute and taking the dispute to the courthouse.¹¹⁷ In communities lacking a justice center, the creation of a center should be encouraged. This allows communities to develop a center from the ground-level in ways that will specifically aid neighbors involved in disputes. In either case, expansion and some form of subsidization are of the most importance: expansion to ensure that services are widely available, and subsidization to make it more likely that neighbors will be able to afford to mediate and arbitrate their differences.¹¹⁸ The effects of community justice centers will benefit the entire community, because when disputing members resolve their differences, the community as a whole becomes stronger.¹¹⁹

¹¹³ See *id.* at 15.

¹¹⁴ So often, proponents of the increased use of ADR stress primarily its cost-saving benefits. Cf. McAdoo & Welsh, *supra* note 9, at 376–77 (citing studies and empirical data focusing on whether or not ADR in fact saves disputants money). However, this is an incomplete depiction of the benefits of ADR. See, e.g., Ulrich, *supra* note 11, at 419–20. DICKEY & MCGARRY appear to have found that ultimately the cost-saving benefits of ADR will not save a program that the community does not value. DICKEY & MCGARRY, *supra* note 109, at 15.

¹¹⁵ Rayburn, *supra* note 29, at 1200 (construing AMERICAN BAR ASSOCIATION, 1993 DISPUTE RESOLUTION PROGRAM DIRECTORY (1993)).

¹¹⁶ See SHAW & KEATING, *supra* note 66, at 62–63 (finding in Illinois that court referrals already constituted a large percentage of cases resolved by the centers).

¹¹⁷ See DICKEY & MCGARRY, *supra* note 109, at 15–16.

¹¹⁸ See ALLEN & MOHR, *supra* note 107, at 104.

¹¹⁹ See Ulrich, *supra* note 11, at 434; Rayburn, *supra* note 29, at 1206.

C. ADR as a Means of First Resolution in Leases and Planned Communities

1. How it Would Work in Practice

One final way to further the use of ADR in settling disputes between neighbors is the inclusion of clauses in leases and planned community charters, which require the use of ADR as a first means of resolution.¹²⁰ The use of these clauses would either remove landlords and community association boards from the unwanted position of arbiter or mediator of disputes, or formally empower the landlord or association board¹²¹ as the arbiter or mediator.¹²²

In those cases where the landlord or board is charged with running the ADR mechanisms between neighbors, the landlord or board should be sure to engage in the training necessary to be a competent administrator of ADR.¹²³

¹²⁰ Although it is arguably the landlord's responsibility to deal with "inter-tenant" complaints, some landlords fail to deal with these problems in a timely manner. For example, in a case in Columbus, Ohio, one residential tenant lived above a coffeehouse. Both the residential tenant and the coffeehouse had the same landlord. It was only after several months of complaints about late night noise coming from the coffeehouse that the landlord took action. Steve Stephens, *Coffeehouse Crowd Trying to Save Haven from Eviction*, COLUMBUS DISPATCH, Dec. 18, 2000, at C1; Interview with Callandra S. Cook, in Columbus, Ohio (Jan. 4, 2001) (interview notes on file with author); see also Randy Kennedy, *Small Owners Say They Are Overlooked*, N.Y. TIMES, June 15, 1997, at 29 (reporting comments by a tenant advocacy spokesperson speaking of the need for statutory protection of tenants vis à vis landlords so tenants will not fear retaliatory measures for tenant complaints). In some cases, however, tenants might prefer not to involve their landlord in a dispute for privacy reasons. Cf. Mollen, *supra* note 6, at 84 (suggesting that sometimes residents are more trusting of a landlord's resolution of a dispute than a resolution suggested by a person who is not a housing professional). Moreover, two tenants of two different landlords could have a dispute where their landlords are unwilling to become involved to solve the problem.

¹²¹ For a discussion of some of the problems between association boards and the communities they govern, see Winokur, *supra* note 18, at 1143.

¹²² Who the arbiter is can be very important in this arena. One commentator has suggested that residents are far more willing to accept the decisions of a "real estate professional" than they are to accept the decisions of a fellow community member with no experience in real estate. See Mollen, *supra* note 6, at 80-81. Thus, empowering a neutral landlord as the arbiter may work more successfully than similarly empowering a member of an association board (essentially made up of community members). See *id.*

¹²³ The training of mediators and arbitrators is usually thought of being an especially important aspect of ADR. See, e.g., Yngvesson, *supra* note 48, at 1703; see

Again, community centers dispensing justice based on ADR principles can play a key role. Neighborhood justice centers can not only be centers of justice, but also centers for training members of the public as mediators and arbitrators. An additional way that community justice centers might aid in the increased use of clauses requiring ADR as a means of first resolution is by encouraging their use by landlords and association boards. If landlords and association boards are unaware of the benefits of ADR as they relate to neighborly relations, and do not know how they can incorporate ADR into their tenants' or homeowners' living arrangements, ADR will not reach this important group.¹²⁴

2. The Fairness of Requiring the Use of ADR

Some may question the fairness of *requiring* persons to engage in mediation and arbitration as a means of first resolution.¹²⁵ The typical concerns of persons who oppose clauses requiring the mandatory use of ADR (such as the clause writer's power to choose the arbitrator, the possibility of limits on damages, and the possibility of uneven bargaining power)¹²⁶ are mitigated by the unique nature of the disputes covered by the clauses, and can be further mitigated through the construction of the clauses.¹²⁷

The clauses should require that ADR be used only as a *first means* of resolution. Thus, disputing neighbors should only be required to make a good faith effort at ADR. If, after engaging in a good faith effort, no acceptable resolution has been found, the parties should be free to litigate their dispute using traditional dispute resolution. This is not an arduous requirement for several reasons. To start, many of the disputes will never make it to court in

also Rayburn, *supra* note 29, at 1223–25 (criticizing the minimal qualifications required at one California community justice center).

¹²⁴ Thus, the community justice center remains a potent force, even for the means of bringing ADR to neighbors' disputes. Perhaps no other mechanism can presently and readily step up to the task of proliferating ADR throughout the general public.

¹²⁵ See, e.g., Cristina Fahrbach, *From Gardner to Circuit City: Mandatory Arbitration of Statutory Employment Disputes Continues*, DISP. RESOL. J. Nov. 2001–Jan. 2002, at 64.

¹²⁶ See *id.*

¹²⁷ See GOLDBERG ET AL., *supra* note 29, at 504 (stating that “coercion *into* mediation does not seem objectionable as long as there is no coercion *in* mediation to accept a particular outcome, and as long as unsuccessful mediation does not serve as a barrier to adjudication”).

the first place.¹²⁸ At a minimum, a clause requiring an attempt at ADR would channel many disputes that might never be resolved toward a process that might lead to a resolution.¹²⁹ At a maximum, it would simply *delay*, but not eliminate, a party's ability to take her case to court. In addition, including in the clause a provision stating that mediation and arbitration settlements could not be introduced into evidence in court would further protect a party's subsequent litigation rights if suit were filed.

More generally, one can view a person as bargaining away some of her rights when deciding to live in a certain community or in a property managed by a certain landlord.¹³⁰ Just as one might give up the right to own a dog in a certain apartment building,¹³¹ or the right to grow vegetables in front of one's condominium, one might also give up the right to initiate the resolution of a dispute with one's neighbor in court.¹³² In short, the requirement that tenants and homeowners start the resolution of disputes between neighbors with ADR mechanisms is not that great of an infringement upon the person's rights.

It is obviously imperative that the landlord or association board requiring the use of ADR ensure that ADR services be available when needed. The clauses should also spell out how the services will be paid for, and who will choose the mediator or arbitrator.¹³³ If either party perceives a bias on the part of the arbiter, the entire exercise of ADR might be for not.¹³⁴ Similarly, if the ADR session requires costs similar to those found in traditional dispute

¹²⁸ See generally McAdoo & Welsh, *supra* note 9 (discussing the benefits that a court-annexed program had in Minnesota for relatively "low dollar" disputes).

¹²⁹ See *supra* Part II.D.

¹³⁰ Cf. Gibeaut, *supra* note 83, at 56.

¹³¹ Indeed, these are non-negotiable bans. Requiring ADR merely as a first means of resolution holds out the possibility of litigation at a later date.

¹³² The clauses requiring ADR as a first means of resolution should not be so involved that they lose sight of the advantages of ADR (*e.g.*, savings in time and money, informality of the process, etc.). In the words of Charles C. Warner (co-chair of the Equal Employment Opportunity Committee for the ABA Labor and Employment Law Section): "If you go too far, then you've created an arbitration system that's just as lengthy and expensive as the court system." Gibeaut, *supra* note 83, at 52.

¹³³ Since it is likely that landlords and association boards will require parties to bear the bulk, or all, of the upfront costs of the ADR proceeding, costs are a consideration. However, even if the landlord or association pays for part, or all, of the ADR costs, the costs will undoubtedly be passed on to the residents in the form of higher rents or association fees. The detriment of the required costs can be mitigated by making it clear to new residents exactly what they are agreeing to when they move into a community.

¹³⁴ See Mollen, *supra* note 6, at 80-81.

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resolution, dissatisfaction with the process becomes a greater possibility, especially since use of ADR would be required.

The use of clauses in leases and planned communities' charters will ensure that more persons use ADR to settle their disputes with their neighbors. To ensure fairness, however, the terms of the clause must be clear. There should be no doubt as to what is required of the disputants, who will bear the costs of the ADR session, and who will serve as arbiter. By taking these measures, residents can make a truly informed decision before moving into a community requiring ADR as a means of first resolution.

D. Final Recommendation

The community justice center stands at the center of increased use of ADR to resolve disputes between neighbors. Traditional court referral will miss too many cases to be the effective tool that it is in other disputes, and if landlords and association boards are ignorant of the ways that ADR can lead to more peaceful neighbor relations, they will not embrace the use of ADR. Thus, community justice centers must be both a provider of ADR services, and an educator of the benefits coming from ADR.

To accomplish these goals, the centers must be more than just well-funded; they must also provide a real alternative to traditional dispute resolution and inaction for its community members. Although the number of justice centers has grown over the past several years, they still primarily rely on court referrals.¹³⁵ Because this process misses so many neighbor disputes, justice centers must find new ways to make the public aware of the services they offer. Encouraging the "first responders" (*i.e.*, police officers) to refer disputants to the centers is one step towards increasing the use of ADR. Increased advertising and civic involvement are additional ways. Finally, funding is, like it is to every other program, extremely important to increasing public awareness and use of ADR.¹³⁶ Without proper funding, justice centers will be unable to offer quality services at a cost that makes engagement in ADR a real alternative to inaction or traditional dispute resolution. Therefore, if communities are serious about making ADR

¹³⁵ Yngvesson, *supra* note 48, at 1703.

¹³⁶ *E.g.*, one community justice program took in a grant of \$150,000 from the Justice Department for a period of eighteen months. In addition to federal funding, it also received \$80,000 from the state to establish the center, and received "significant 'in kind' support" from the city it served. Community Justice Center of Burlington, Vermont, *supra* note 41, at <http://www.communityjusticeburlvt.org>.

available for neighbor disputes, they must make a financial commitment to the process in order to make it truly effective.

IV. CONCLUSION

As our population has grown, isolation from our neighbors has become increasingly impossible. Even if Robert Frost's adage, "Good fences make good neighbors,"¹³⁷ was ever a viable option, it certainly is not in the highly integrated society of the United States in the twenty-first century. We can build neither physical nor mental fences to keep our neighbors out of our lives.

The use of ADR to settle disputes between neighbors presents society with a means of resolving problems that would frequently never be resolved. Because of lower transaction costs, many who might never have considered resolving their disputes can have the opportunity to live in peace with their neighbors. Alternative dispute resolution also presents the prospect of finding better-tailored solutions to meeting the true needs of the neighbor relationship than the remedies traditionally available in the courthouse. If the parties to the dispute know they "own" both the solution and the process for coming to the solution, not only the process but the result will be more enduring.¹³⁸ However, it is important for the ADR community to ensure that its core values are protected. If the ADR process resembles the existing judicial system to too great a degree, the many advantages of choosing ADR over the traditional dispute resolution system will be eliminated.¹³⁹

It is, of course, not enough to tout the advantages of using ADR to settle disputes between neighbors; ADR must actually be used. To accomplish this, I have proposed three chief means of making ADR more accessible to the public. First, traditional court-referral (to both independent justice centers using ADR and court-annexed centers) will continue to play a role in bringing disputing neighbors to ADR. Courts, having recognized the unique nature of conflict between persons involved in the neighbor relationship, already refer many of these cases to ADR.¹⁴⁰ Such referrals should continue. Second, community centers dispensing ADR services should make their

¹³⁷ Frost, *supra* note 1, at 622.

¹³⁸ See Rayburn, *supra* note 29, at 1225.

¹³⁹ See generally Gibeaut, *supra* note 83 (discussing the problem that results when ADR costs approach the level of traditional dispute resolution costs).

¹⁴⁰ See Yngvesson, *supra* note 48, at 1704 (commenting that court personnel in one California court referred cases they deemed "unresolvable" to the local ADR center).

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presence in the community better known. Local police departments should be encouraged to refer disputants to community centers. The centers themselves should advertise their services to the public. Most importantly, communities must appreciate that the community as a whole benefits when neighbors are getting along with one another and work to ensure that ADR services at community centers remain an economical and viable choice for all. Third, landlords and association boards should consider the inclusion of clauses requiring the use of ADR as a first means of resolution in leases and charters of planned communities. Such a move would result in even more neighbors resolving their disputes.

Because of the intimate relationship that is inherent with those who live near us, ADR mechanisms are needed to resolve differences with those persons. Alternative dispute resolution not only leads to more creative solutions to problems than traditional litigation, it can also mend a broken relationship. Its use should be encouraged to create a more harmonious and peaceful community.

